STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF BRADLEY CORL, by Kimberly Corl, Personal Representative, Plaintiff-Appellee, v HURON & EASTERN RAILWAY and RAILAMERICA, INC., Defendants-Appellants.	UNPUBLISHED December 23, 2014 No. 319004 Tuscola Circuit Court LC No. 11-026733-NI

Before: O'CONNELL, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Defendants, Huron & Eastern Railway and RailAmerica, Inc., appeal by leave granted the trial court's order denying defendants' motion to dismiss plaintiff's claims pursuant to MCR 2.116(C)(10). We affirm in part and reverse and remand in part.

I. SUMMARY OF FACTS AND PROCEDURAL BACKGROUND

Plaintiff's decedent was killed when his truck was stuck by a train at a grade crossing on Lobdell Road in Mayville, Michigan. The crossing was marked by railroad warning signs, yield signs, and painted railroad pavement markings, as well as reflectorized crossbucks near the crossing. Moreover, it was undisputed that the train properly sounded its whistle as it approached the crossing and was traveling 25 miles per hour, in accord with federal train speed regulations. According to three eyewitnesses, decedent, who was driving southbound on Lobdell Road, came to a complete stop before the railroad tracks. He then leaned toward the passenger side of the vehicle as if he were going to pick something up from the floor. While he was bent over, the vehicle rolled onto the railroad tracks and was struck by the train. Decedent died as a result of his injuries.

In a five-count complaint, plaintiff alleged that defendants provided an inadequate warning device for the crossing, failed to provide a reasonably safe grade crossing, failed to clear obstructing vegetation, failed to warn, and that the train traveled at excessive speed. The parties stipulated to the dismissal of the last two counts, and defendants moved for summary disposition under MCR 2.116(C)(10) as to the remaining claims. At issue on appeal is the trial court's decision to deny defendants' motion for summary disposition as to plaintiff's claims that defendants breached their common law duty to maintain a safe grade crossing, when defendants

failed to deploy a flagman at the crossing, and failed to create a clear vision area by removing obstructive vegetation. The trial court also denied defendants' motion for summary disposition on the issue of proximate cause.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (internal quotations and citations omitted). The motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). "There is a genuine issue regarding any material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). The court may not make factual findings on disputed factual issues during a motion for summary disposition and may not make credibility determinations. *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004). The interpretation of a statute is a question of law that this Court reviews de novo. *Id*.

III. DUTY TO DEPLOY A FLAGMAN

The first question is whether defendants had a duty to deploy a flagman at Lobdell crossing. Defendants contend that they had no duty to deploy a flagman because MCL 257.668(2) precludes negligence claims based on a railroad's failure to deploy a flagman unless ordered to deploy one by public authority and because plaintiff's claim is preempted by federal law. We agree.

MCL 257.668(2) provides in pertinent part:

> The erection of or failure to erect, replace, or maintain a stop or yield sign or other railroad warning device, unless such devices or signs were ordered by public authority, shall not be a basis for an action of negligence against the state transportation department, county road commission, the railroads, or local authorities.

This Court has previously held that "in enacting [MCL 257.668(2)], the Legislature intended that no liability was to be premised upon the absence of warning devices at a railroad crossing absent an order by the proper authority to install devices and a failure to follow that order." *Turner v CSC Transp, Inc*., 198 Mich App 254, 257; 497 NW2d 571 (1993). Accordingly, under MCL 257.668(2), "the duty to determine the appropriate warning devices to be installed at railroad crossings lies with the appropriate governmental entity with jurisdiction over the roadway, not with the railroad." *Turner*, 198 Mich App at 257. Consequently, if a flagman is included in the definition of "railroad warning device" and was not ordered by the public authority, defendants cannot be held liable for failing to deploy a flagman.

The phrase "railroad warning device" is not defined in MCL 257.668. However, the similar phrase "active traffic control device" is defined in the Michigan Railroad Code of 1993, MCL 462.101 *et seq*. MCL 462.105(1) provides:

> "Active traffic control devices" means those traffic control devices located at or in advance of grade crossings, activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, *manually operated devices, and a crossing watchperson*, all of which display to operators of approaching vehicles positive warning of the approach or presence of a train [(emphasis added).]

The definition in MCL 462.105(1) is instructive because it shows that the Legislature intended the term "device" to include people, in addition to signs and other inanimate warning devices. Further, it is appropriate to read MCL 257.668 and MCL 462.105 *in pari materia* because, even though they contain no reference to one another, they relate to the same subject. *Titan Ins Co v State Farm Mut Auto Ins*, 296 Mich App 75, 84; 817 NW2d 621 (2012). Accordingly, we conclude that a flagman is a "railroad warning device" within the meaning of MCL 257.668(2), and defendants are not subject to liability based upon the absence of a flagman because the proper authority did not give an order requiring deployment of a flagman. See *Turner*, 198 Mich App at 257.

In addition, pursuant to *Paddock v Tuscola & Saginaw Bay R Co, Inc*, 225 Mich App 526, 530; 571 NW2d 564 (1997), plaintiff's claim that defendants should have deployed a flagman is preempted by federal law. In *Paddock*, the plaintiff's decedent was killed at a grade crossing that plaintiff alleged was extra hazardous. *Id*. at 529. Among other claims, the plaintiff alleged that because of the hazardous nature of the crossing, the defendant railroad had a duty to stop its train and deploy a flagman to warn motorists of the train's presence. *Id*. at 530. This Court disagreed, reasoning that the plaintiff's claim was preempted by federal law because "the United States Supreme Court held that state-law tort claims based on train speed are preempted by federal law." *Id*. (citing *CSX Transp, Inc v Easterwood*, 507 US 658; 113 S Ct 1732; 123 L Ed 2d 387 (1993)). Specifically, this Court stated that "if a train cannot be compelled to slow down as it approaches a crossing, it also cannot be compelled to stop altogether in order to deploy a flagman." *Id*. at 531. Thus, following *Paddock*, plaintiff's state law claim that the railroad should have deployed a flagman is preempted by federal law, and the trial court erred in denying summary disposition on this ground.[1]

IV. FAILURE TO CREATE A CLEAR VISION AREA

[1] Plaintiff argues that *Paddock* was effectively overruled by the Sixth Circuit in *Shanklin v Norfolk Southern*, 369 F3d 978 (CA 6 2004). However, decisions of the Sixth Circuit are not binding on this Court. *Mettler Walloon, LLC, v Melrose Twp*, 281 Mich App 184, 221 n 6; 761 NW2d 293 (2008). Moreover, *Paddock* is binding on this Court because it was published after November 1, 1990, and has not been overruled or modified by our Supreme Court or a special panel of this Court. MCR 7.215(J)(1).

The next question is whether a railroad has a common law duty to maintain the vegetation on its right-of-way so as to provide a clear vision area for motorists. Defendants argue that the duty to act with respect to vegetation belongs solely to the appropriate road authority and that, in the absence of an order to create a clear vision area at a crossing, a railroad cannot be held liable. We disagree.

At the common law, railroads had a duty to maintain crossings in a reasonably safe condition. *Masters v Grand Trunk Western R*, 13 Mich App 80, 83; 163 NW2d 661 (1968); *Emery v Chesapeake & O R Co*, 372 Mich 663, 673; 127 NW2d 826 (1964). That duty included a duty to prevent visual obstruction of the track. See *Martin v Ann Arbor Railroad*, 76 Mich App 41, 46; 255 NW2d 763 (1977) (holding that there was sufficient evidence of proximate cause after the parties introduced evidence "as to the placement of the speed limit and warning signs, the absence of flashing light warning devices, and visual obstruction of the track."). Defendants suggest that this Court held in *Paddock* that a railroad has no duty to remove visual obstructions absent an order from the appropriate road authority. However, in *Paddock*, this Court held that "[u]nder the plain language of [MCL 462.317(1)[2]], it is the responsibility of the road authority—not the railroad—to determine the need for a clear vision area." *Paddock*, 225 Mich App at 534. The Court went on to explain:

> As this Court held in *Turner*, *supra*, pp 256-257, where the duty to consider corrective actions at a railroad crossing lies with the governmental entity with jurisdiction over the roadway, and not with the railroad, the railroad has *no duty to petition* the governmental entity to act. Consistent with *Turner*, therefore, we conclude that a railroad has *no duty to petition* a road authority for the creation of a clear vision area at a railroad crossing [*Id.* (emphasis added).]

Based on the above language, defendants assert that this Court held that a railroad has no duty to act with respect to vegetation in the absence of an order from the appropriate road authority to create a clear vision area. However, a careful reading of this Court's language shows that this Court has *not* held that a railroad has no duty to remove vegetation. Instead, this Court held railroads do not have a duty to *petition* the governmental authority to take corrective action. Thus, although defendants essentially ask this Court to extend the holding in *Paddock* to state that a railroad has no duty to create a clear vision area, nothing in the plain language of MCL 462.317 supports such an extension. See *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 217; 801 NW2d 35 (2011) ("[N]othing may be read into a statute that is not

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[2] MCL 462.317(1) provides:

> If a road authority determines to establish a clear vision area as described in this section, the railroad and a road authority may agree in writing for clear vision areas with respect to a particular crossing. The portions of the right-of-way and property owned and controlled by the respective parties within an area to be provided for clear vision shall be considered as dedicated to the joint usage of both railroad and road authority.

within the manifest intent of the Legislature as derived from the act itself."). Moreover, unlike the plain language of MCL 257.668(2), which precludes negligence claims against a railroad based on inadequate warnings in the absence of the failure to follow an order from the road authority, the plain language of MCL 462.317 does not expressly or implicitly carve out an exception from the railroad's common law duty to provide a safe grade crossing. Furthermore, well-settled common law principles are not to be abolished by implication, and when an ambiguous statute contravenes common law, it must be interpreted so that it makes the least change in the common law. *Walters v Leech*, 279 Mich App 707, 710-711; 761 NW2d 143 (2008). Consequently, even though there is no duty to petition the road authority to create a clear vision area, the railroad's common law duty to provide a safe grade crossing has not been abrogated by statute. Accordingly, the trial court did not err in denying defendants' motion for summary disposition based on plaintiff's claim that defendants had a duty to create a clear vision area.

V. PROXIMATE CAUSE

The final question is whether the trial court erred in denying summary disposition as to the issue of proximate causation. Defendants argue that the uncontested facts show that plaintiff's injuries were not proximately caused by defendants. We disagree.

"The requisite elements of a negligence cause of action are that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered." *Shultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). The assessment of proximate cause is generally a jury matter "unless reasonable minds could not differ regarding the issue." *Lockridge v Oakwood Hosp*, 285 Mich App 678, 684; 777 NW2d 511 (2009).

Here, the trial court concluded that both parties submitted conflicting factual evidence. Review of the evidence shows that plaintiff's decedent came to a complete stop at the stop bar before the railroad tracks. A motorist stopped on the other side of the tracks flashed his lights at decedent to alert him to the approaching train. The motorist, the motorist's passenger, and the engineer conductor on the train all stated that decedent leaned toward the passenger side of the vehicle, and was still leaning when his vehicle moved onto the tracks. They stated that it appeared as if decedent was trying to pick something up from the floor. The engineer conductor expressly said that it did not appear as if plaintiff's decedent was trying to look down the track. He also clarified that he was about a hundred feet away when he saw decedent leaning toward the passenger side of the vehicle as if to pick something up from the floor. He said he did not see decedent's face. Photographs submitted by defendants show that a train was visible through the vegetation when 1300 feet from the crossing, and that at a distance of 100 feet—which is the distance the engineer conductor asserted he was from decedent when decedent leaned over—the train is undeniably visible through the vegetation. Further, additional photographs submitted by defendants show that the tracks are visible for some distance, in spite of the vegetation on the side of the road. The photographs also show the view from a truck similar to plaintiff's decedent's; the view shows that the tracks are visible for some distance. However, plaintiff's expert reviewed various materials, including the photographs, his own calculations, the information from the train's event recorder, and the witnesses' statements. He then opined that the "grade crossing was unduly hazardous due to sight obstructions created by both foliage and

the severe angle of the intersection of the railroad track and Lobdell Road," and that the "collision . . . was caused by the aforementioned sight obstructions." Accordingly, it is clear that there was a factual dispute as to whether the vegetation was a proximate cause of the accident. As such, the trial court did not err in denying defendants' motion for summary disposition on this issue.

Affirmed in part and reversed and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello